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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1942

No. 668

ALBERTA WEBER DEJONG,
Petitioner,

vs.

RUTH TIETSORT,
Respondent.

Reply Brief.

JOHN JAMES ZISKA,
Attorney for Petitioner.

Of Counsel:
EWART HARRIS.

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Alberta Weber DeJong, respectfully submits this Reply to the Answer and Brief of Respondent.

The force of the Illinois cases of *Pike County Mutual Benefit Association* v. *Berry,* 214 Ill. App. 316, and *Modern Woodmen of America* v. *Allin,* 301 Ill. 119, cited in Petitioner's Brief, which should have controlled the decision of the Circuit Court of Appeals in this case, is not weakened by the citation of authorities in respondent's answer.

The general statement from 52 A. L. R. 395, cited on page 7 of respondent's brief, that where a beneficiary is *designated by name,* words of relationship are descriptive

only, does not apply to the case at bar, for the reason that in the policy in question the beneficiary was not designated by name. Had the policy read "Ruth De Jong," a specific person, instead of "Mrs. C. S. DeJong," which designated any wife of the insured, a different question would be presented.

In *Day* v. *Case*, cited on page 8, the beneficiary was "Mrs. H. M. Case *or lawful heirs*"; and in *Griffiths* case, cited on page 12, the proceeds were payable to the "wife, *or if she be dead*" to the children, so that in each case there was a definite pointing out of the first wife as the person intended. No such indication is present in the policy in question, which is payable to "Mrs. C. S. DeJong, relationship wife" of the insured.

In *Continental Bank and Trust Company* v. *Sovereign Camp*, cited on page 10, the question was whether the second wife should take the entire fund or whether she should share with the children of the first marriage. The court, in ascertaining the intent of the insured, found that the insured clearly had in mind the person who was his wife at the time of the issuance of the certificate; and go on to say:

> "This view of the insured's state of mind when the certificate was issued is strengthened by the reflection that he could reasonably be supposed to have in contemplation the birth of children as the result of his marriage. In that case, and in the event the mother of the children survived him, it was wholly reasonable for the insured to conclude, as undoubtedly he did conclude, that the children would benefit under the policy as well as their mother. On the other hand, it is utterly unreasonable to suppose that the insured had in mind at the time a possible second marriage, as the result of which he would be survived by a second wife who would take under the certificate, *to the exclusion of his children by his first marirage.*

If it be said that the insured may have considered the contingency of a second marriage, then it may also be said, with equal reason, that he also considered that, under the by-laws of the insurer, the needs of his second wife as well as the needs of his children by his first wife would be provided for." (Italics ours.)

(The by-laws provided that where the designated beneficiary died, the benefit should be paid to the surviving widow and surviving children of the member, share and share alike.)

The answer of respondent is based upon the contention that Ruth Tietsort, then Ruth DeJong, was *named* in the policy as beneficiary. This is not so. The designation of the beneficiary as the wife of the insured by the description of "Mrs. C. S. DeJong" is not the naming of the particular person, Ruth, who was then the wife of the insured, but is the designation of any wife of the insured (all of whom would be "Mrs. C. S. DeJong") who should be his wife at the time of his death, when the fund became payable. The intent that the widow of the insured should benefit was present at the time the policy was applied for and issued: who the widow might be, was to be ascertained at the time of his death.

In *Mutual Life Insurance Co.* v. *Devine,* 180 Ill. App. 422, cited and quoted from by respondent as one of petitioner's cases, on page 13 of respondent's brief, the Court, on page 426, say:

"At common law, a contract must be so construed as to carry into effect the real intent and understanding of the parties * * *

In construing a contract the court will, if necessary, put itself in the place of the parties and read the contract in the light of the objects they had in view and the circumstances surrounding them at the time it

was made, so as to be able to understand the language employed in the sense intended by them * * *

In contracts of life insurance proper, * * * the intent of the insured as to who the beneficiary shall be is the intent of all concerned * * * beneficiaries are often not yet *in esse*. * * * It is a matter of common knowledge that in a very great majority of cases, life insurance is purchased by the insured, because of his laudable desire to leave, when he dies, to those persons who are the natural objects of his love, care and bounty an amount of money larger than he could otherwise do, and to thereby decrease to that extent the chance of his dependent wife, * * * becoming a public charge or in want of the necessities of life.

When by the terms of a Will, a fund is given to a class of persons, it is held by what we understand to be an unbroken line of authorities that the determination of who belong to the class and who consequently are entitled to participate in the distribution of the fund is postponed until the death of the testator, and the fund goes to the survivor or survivors of the designated class. We are aware that there is a line of authorities holding that contracts of insurance are not to be construed by the same rules applicable to the construction of wills. There are also a number of cases in various jurisdictions in the United States holding exactly the contrary, as to the parts of life insurance contracts relating to the distribution of the fund. These last mentioned cases are, in our opinion, the best reasoned, and where followed, tend in many cases to prevent a distortion of the real purpose of life insurance contracts.

It cannot be denied that the disposition of life insurance funds arising from a straight life insurance policy is in many respects strikingly akin to a testa-

mentary disposition of property. The will of the insured, like the will of the testator, when ascertainable and not in conflict with positive law, usually governs. The distribution does not take place until the death of the insured in the one case, and the death of the testator in the other. The fund usually goes to persons bound to the insured in the one case and the testator in the other by ties of consanguinity or affinity. The disposition of the fund is governed by the arbitrary wish of the party directing it.

No sufficient reason can be urged, it seems to us, why the real intention of the insured, the real thing on which his mind was centered when he made his insurance contract, should not be ascertained by the same rules by which the real intention of a testator, the real thing on which his mind was centered when he made his will, is determined."

The real thing on which the mind of the insured was centered when he obtained the insurance policy in question was the benefit to his widow in case of his accidental death. This remained his intent after his divorce from his then wife Ruth, and his marriage to petitioner. Under the settled law in Illinois, the fund in question is payable to the widow of the insured, who is the petitioner in this case.

We respectfully submit that the Writ of Certiorari should issue as prayed.

Respectfully submitted,

JOHN JAMES ZISKA,
Attorney for Petitioner.

Of Counsel:
EWART HARRIS.